

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

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|---------------------------------|---|-------------------------|
| IN RE: BANK OF AMERICA |) | |
| WAGE AND HOUR EMPLOYMENT |) | |
| LITIGATION |) | Case No. 10-MD-2138-JWL |
| |) | |
| This Order Relates to All Cases |) | |

SCHEDULING ORDER

On November 5, 2010, pursuant to Fed. R. Civ. P. 16(b), the court conducted a scheduling conference in this case with the parties.¹ Plaintiff appeared through counsel George Hanson, Virginia Crimmins, Brendan Donelon, Stanley Saltzman, and Marcus Bradley. Defendant appeared through counsel Jack Rowe, Matthew Kane, Michael Mandel, and Aaron Longo.

After consultation with the parties, the court enters this scheduling order, summarized in the table that follows:

¹As used in this scheduling order, the term “plaintiff” includes plaintiffs as well as counterclaimants, cross-claimants, third-party plaintiffs, intervenors, and any other parties who assert affirmative claims for relief. The term “defendant” includes defendants as well as counterclaim defendants, cross-claim defendants, third-party defendants, and any other parties who are defending against affirmative claims for relief.

| SUMMARY OF DEADLINES AND SETTINGS | |
|--|-------------------|
| Event | Deadline/Setting |
| Initial disclosures exchanged | November 30, 2010 |
| All discovery re: class and collective action certification completed | June 1, 2011 |
| Experts disclosed by plaintiff | April 1, 2011 |
| Experts disclosed by defendant | May 2, 2011 |
| Rebuttal experts disclosed | May 15, 2011 |
| Independent medical examinations | n/a |
| Supplementation of disclosures | April 22, 2011 |
| Jointly proposed protective order submitted to court | November 30, 2010 |
| Motion and brief in support of proposed protective order (only if parties disagree about need for and/or scope of order) | November 30, 2010 |
| Motions to dismiss for lack of personal jurisdiction, venue, propriety of the parties, or failure to state a claim | December 31, 2010 |
| Motion for class certification or conditional collective action certification | June 15, 2011 |

1. Alternative Dispute Resolution (ADR).

a. Mediation is not ordered at this time. The Court will re-evaluate the appropriateness of mediation after any motions for class certification or conditional collective action certification have been ruled upon.

2. Discovery.

a. The parties shall exchange by **November 30, 2010** the information required by Fed. R. Civ. P. 26(a)(1) relating to class certification issues. In order to facilitate settlement negotiations and to avoid unnecessary expense, the parties have agreed that, without any need for formal requests for production, copies of the various documents described in the parties' respective Rule 26(a)(1) disclosures shall be exchanged by **December 30, 2010**. The parties are reminded that, although Rule 26(a)(1) is keyed to disclosure of information that the disclosing party "may use to support its claims or defenses, unless solely for impeachment," as made clear by the advisory committee notes to the 2000 amendments to that rule, this also requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party. In addition to other sanctions that may be applicable, a party who without substantial justification fails to disclose information required by Fed. R. Civ. P. 26(a) or Fed. R. Civ. P. 26(e)(1) is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. *See* Fed. R. Civ. P. 37(c)(1).

b. Discovery in this action shall be phased. The first phase shall focus on pre-certification discovery (meaning discovery directed towards certification issues under Fed.

R. Civ. P. 23 and/or Section 216(b) of the Fair Labor Standards Act). Discovery is not strictly limited to certification issues, however, and the Court anticipates that some merits discovery will occur in the first phase of discovery. All discovery in the first phase shall be commenced or served in time to be completed by **June 1, 2011**. After any motions for class certification or conditional certification of a collective action have been ruled upon, the Court will hold another scheduling conference to discuss case management deadlines for the second phase of discovery.

c. The parties intend to serve disclosures and discovery electronically, as permitted by D. Kan. Rules 5.4.2 and 26.3.

d. Consistent with the parties' agreements as set forth in the planning conference report submitted pursuant to Fed. R. Civ. P. 26(f), electronically stored information (ESI) in this case will be handled as follows: "The production of electronically stored information shall be in accordance with Rule 34(b)(2)(E) of the Federal Rules of Civil Procedure."

e. Consistent with the parties' agreements as set forth in their Rule 26(f) report, claims of privilege or of protection as trial-preparation material asserted after production will be handled as follows: The parties will include a clawback provision in any motion for protective order.

f. Plaintiffs shall serve no more than **35** interrogatories, including those already served in this action. Defendants shall serve no more than **25** interrogatories on up to fifty (50) plaintiffs, including class representatives and opt-in plaintiffs.

g. There shall be no more than **50** depositions by plaintiff and **50** by defendant. Depositions are not strictly limited to class certification issues. To avoid multiple depositions of the same individuals, the parties are encouraged to inquire into the merits of the underlying claims where appropriate.

h. Each deposition shall be limited to **7** hours. All depositions shall be governed by the written guidelines that are available on the court's Internet website,

(<http://www.ksd.uscourts.gov/guidelines/depoguidelines.pdf>).

i. Disclosures required by Fed. R. Civ. P. 26(a)(2), including reports from retained experts, regarding certification issues shall be served by plaintiff by **April 1, 2011**, and by defendant by **May 2, 2011**. Disclosures and reports by any rebuttal experts shall be served by **May 15, 2011**. The parties shall serve any objections to such disclosures (other than objections pursuant to Fed. R. Evid. 702-705, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law), within 11 days after service of the disclosures upon them.

j. The parties agree that physical or mental examinations pursuant to Fed. R. Civ. P. 35 are not appropriate in this case.

k. Supplementations of disclosures under Fed. R. Civ. P. 26(e) shall be served at such times and under such circumstances as required by that rule. In addition, such supplemental disclosures shall be served by **April 22, 2011**, 40 days before the deadline for completion of all certification discovery.

1. Discovery in this case may be governed by a protective order. If the parties agree concerning the need for and scope and form of such a protective order, their counsel shall confer and then submit a jointly proposed protective order by **November 30, 2010**. Such jointly proposed protective orders should be drafted in compliance with the written guidelines that are available on the court's Internet website:

(<http://www.ksd.uscourts.gov/guidelines/protectiveorder.pdf>).

At a minimum, such proposed orders shall include, in the first paragraph, a concise but sufficiently specific recitation of the particular facts in this case that would provide the court with an adequate basis upon which to make the required finding of good cause pursuant to Fed. R. Civ. P. 26(c). If the parties disagree concerning the need for, and/or the scope or form of a protective order, the party or parties seeking such an order shall file an appropriate motion and supporting memorandum by **November 30, 2010**.

m. To avoid the filing of unnecessary motions, the court encourages the parties to utilize stipulations regarding discovery procedures. However, this does not apply to extensions of time that interfere with the deadlines to complete all discovery, for the briefing or hearing of a motion, or for trial. *See* Fed. R. Civ. P. 29; D. Kan. Rule 6.1(a). Nor does this apply to modifying the requirements of Fed. R. Civ. P. 26(a)(2) concerning experts' reports. *See* D. Kan. Rule 26.4(b).

3. Motions.

a. Any motion for class certification pursuant to Fed. R. Civ. P. 23 or conditional certification of a collective action pursuant to section 216(b) of the FLSA shall be filed by

June 15, 2011. Defendants' response shall be filed within 30 days of Plaintiffs' filing. Any reply by Plaintiffs shall be filed within 21 days of Defendants' response.

b. The Court will set the deadline for the filing of any motions for leave to join additional parties or to otherwise amend the pleadings at a subsequent scheduling conference, after any certification motions have been ruled upon.

c. Provided that such defenses have been timely preserved, any motions to dismiss for lack of personal jurisdiction, venue, propriety of the parties, or failure to state a claim upon which relief can be granted shall be filed by **December 31, 2010.**

d. Any motion to compel discovery in compliance with D. Kan. Rules 7.1 and 37.2 shall be filed and served within **45** days of the default or service of the response, answer, or objection which is the subject of the motion, unless the time for filing such a motion is extended for good cause shown. Otherwise, the objection to the default, response, answer, or objection shall be waived. *See* D. Kan. Rule 37.1(b).

4. Other Matters.

a. Within fourteen (14) days after a ruling is entered on any motion for class certification and/or conditional collective action certification, the parties shall submit a proposed case management order governing discovery and proceedings for all remaining issues.

b. The parties are not prepared to consent to trial by a U.S. Magistrate Judge at this time.

c. The arguments and authorities section of briefs or memoranda submitted shall not exceed 30 pages, absent an order of the court.

This scheduling order shall not be modified except by leave of court upon a showing of good cause.

IT IS SO ORDERED.

Dated this 9th day of November, 2010, at Topeka, Kansas.

s/ K. Gary Sebelius
K. Gary Sebelius
U.S. Magistrate Judge